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Supreme Court, U.S.
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No. 01-413

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

UNITED STATES OF AMERICA *ex rel.* LINDA A. LUJAN,

Petitioner,

v.

HUGHES AIRCRAFT COMPANY,

Respondent.

On Petition for a Writ of *Certiorari*
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Hughes Aircraft Company takes issue with the argumentative, unclear and confusing statement of the questions presented in the petition. Instead, Hughes believes that the question raised by the petition can be stated simply as follows:

Did the Ninth Circuit err in determining that Petitioner Linda A. Lujan's "qui tam" action was barred by the False Claims Act's "first-to-file" rule set forth in 31 U.S.C. § 3730(b)(5)?

PARTIES TO THE PROCEEDING

Respondent Hughes Aircraft Company ("Hughes") clarifies that Petitioner's "List of Parties" includes "United States of America." The United States is not a party to this action. This being a "qui tam" action under the False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, the United States had the right to intervene in the action at the outset (31 U.S.C. § 3730(b)(4)(B)), but it notified the District Court that it declined to do so.

CORPORATE DISCLOSURE STATEMENT

Hughes Aircraft Company was, at the time this lawsuit was filed, a Delaware corporation, which was a wholly-owned subsidiary of Hughes Electronics Corporation, a Delaware corporation, which was a wholly-owned subsidiary of General Motors Corporation. In December 1997, Hughes Aircraft Company merged with Raytheon Company, a Delaware corporation, which has issued various classes of shares to the public.

OPINION BELOW

Hughes clarifies that the only decision on which the Petitioner seeks review is *United States ex rel. Lujan v. Hughes Aircraft Company*, 243 F.3d 1181 (9th Cir. 2001) (referred to as *Lujan III* because it was the third time the Ninth Circuit had rendered a decision in the case). The two other *Lujan* decisions listed in the Petition are prior decisions in this action which are not presented for review.

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INTRODUCTION

Respondent Hughes Aircraft Company ("Hughes") asserts herein that there is no proper ground for granting the petition. Lujan appeals from a decision which barred her False Claims Act "qui tam" action because her action was based on a qui tam action filed earlier by someone else. 31 U.S.C. § 3730(b)(5).[1] The language of that "first-to-file" provision is clear, and there is no split among the circuits as to its interpretation or application. Further, there is no compelling reason to grant the Writ. *See* S.Ct. Rule 10.

Lujan's petition presents a distorted set of facts in an effort to fabricate some error by the Ninth Circuit. Lujan claims that the Ninth Circuit ignored the "law of the case" doctrine as articulated by this Court in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988). Lujan asserts that prior to the Ninth Circuit rendering the decision which is the subject of her petition, an earlier Ninth Circuit panel had "implicitly" ruled that her action was somehow exempt from the application of the first-to-file rule in § 3730(b)(5). Thus, she contends it was improper for the subsequent panel to consider and rule against her on that question.

The facts and the procedural history of Lujan's action, however, demonstrate clearly that the Ninth Circuit did not "ignore" the law of the case doctrine. In the prior decision to which she refers, the Ninth Circuit simply did not consider or even mention the "first-to-file" rule. Thus, there was no law of the case established; consequently *Christianson's* law of the case doctrine did not apply in this situation.

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[1] Section 3730(b)(5) provides: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on facts underlying the pending action."

The subsequent panel, rendering the decision which is the subject of Lujan's petition, rejected Lujan's baseless interpretation of the earlier panel's decision and held: "we did not explicitly or implicitly decide that issue." *United States ex rel. Lujan v. Hughes Aircraft Company*, 243 F.3d 1181, 1187 (9th Cir. 2001) ("*Lujan III*"). Therefore, the court, in *Lujan III*, properly considered *for the first time* whether her action was barred by the first-to-file rule. The court concluded that Lujan's action was barred because she was not the first-to-file.

PERTINENT STATUTORY PROVISIONS

The Petitioner refers to and appends the entire False Claims Act. Hughes notes that only two particular provisions in that appendix are at issue: 31 U.S.C. § 3730(b)(5) and § 3730(e)(4).

STATEMENT OF THE CASE

Lujan filed this "qui tam" action pursuant to the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, in 1992. Lujan's complaint alleged that her former employer, Hughes, mischarged costs to the U.S. Government for the development and production of radar systems on four different aircraft programs—the B-2, F-15, F-14, and F-18 aircraft.

Lujan was not the first qui tam relator to file these claims against Hughes. Lujan's allegations were substantially similar to those which had been brought three years earlier by another former employee of Hughes, named William Schumer ("Schumer"). *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1032 (9th Cir. 1998) ("*Lujan II*") (finding substantially similarity between Lujan's and Schumer's actions).

The question presented by Lujan's petition requires an accurate conveyance of the procedural history of both

Schumer's and Lujan's qui tam actions, including the various decisions rendered in the two actions. As noted below, Lujan's description of this history is not accurate, and her mischaracterizations are the groundwork of her flawed legal arguments.

Schumer's action. Schumer filed his action in 1989 alleging cost mischarging within and among the same four radar programs noted above, from the period of 1982 through 1989. Even before Schumer filed his action, the Government had been auditing these same costs. After Schumer filed his action, the government rendered a determination that the costs had been charged properly and in a manner which had actually saved the Government money. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 942-43, fn.1 (1997). In 1992, the District Court granted summary judgment in *Schumer* in favor of Hughes, concluding that the questioned costs had been charged appropriately. *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1516 (9th Cir. 1995). The Ninth Circuit affirmed the dismissal on the merits of nearly all of the District Court's findings, but it remanded for further consideration two particular representations made by Hughes in 1982 and 1984. *See Schumer*, 63 F.3d at 1523-25.

Hughes had asserted that, because those two allegations concerned conduct occurring before 1986, they were barred under the FCA's pre-1986 jurisdictional bar. *Schumer*, 63 F.3d at 1517. That provision barred any qui tam action based on information already known to the Government. *See* 31 U.S.C. § 3730(b)(4) (1982). However, the Ninth Circuit rejected Hughes' argument, holding that the elimination of that "government knowledge" defense by the 1986 FCA amendments applied retroactively. *Schumer*, 63 F.3d at 1516-17. Hughes appealed that holding to this Court, which held that the 1986 Amendments could not be applied retroactively to pre-1986 conduct, *i.e.*, that Schumer's pre-1986 allegations were barred by the pre-1986 FCA's "government knowledge" defense. *Schumer*, 520 U.S. at 946-52.

Thus, in sum, Schumer's action was disposed of as follows: (a) his pre-1986 claims were jurisdictionally barred, and (b) his post-1986 claims were dismissed on the merits, and that dismissal was affirmed by the Ninth Circuit and unaffected by the Supreme Court's decision regarding the lack of jurisdiction over the pre-1986 claims. *Schumer*, 63 F.3d at 1528.

Lujan ignores this latter result. She asserts, with no foundation, that the entire *Schumer* case was, in effect, a "nullity" because of this Court's determination as to the lack of jurisdiction over Schumer's pre-1986 claims. In fact, the District Court in the instant action accurately recounted the procedural history of *Schumer* and found that "the only claims of Schumer's that were not decided on the merits involved pre-1986 conduct . . . ." *See* Order Granting Defendant's Motion to Dismiss (Jan. 20, 2000). Resp. App. at 19. Thus, Schumer's post-1986 claims were not a "nullity," in any sense; they were litigated and found to be without merit.

Lujan's action. In 1992, Lujan filed her action, attempting to revive the same allegations that Schumer had made. The District Court first dismissed her action for violation of the requirement that it be filed *in camera*. 31 U.S.C. § 3730(b)(2). The Ninth Circuit reversed that dismissal order, but in so doing, it noted, *sua sponte,* that Lujan's allegations resembled those which it had seen in the *Schumer* case. *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 248 (9th Cir. 1995) ("*Lujan I*"). Accordingly, the Ninth Circuit specifically ordered the District Court to consider whether Lujan's action was barred under the particular provision of the FCA which jurisdictionally bars qui tam actions based upon publicly

disclosed allegations of which the relator is not an original source -- Section 3730(e)(4).[2] *Id.*

Following the precise mandate of the Ninth Circuit, as it was obligated to do, the District Court issued a briefing order directing the parties to brief *only* the question of jurisdiction under section 3730(e)(4). *See* Order Re Briefing Issues Upon Remand (Dec. 13, 1995). Resp. App. at 1-2. Accordingly, the parties briefed only that particular question. At that time Hughes did not raise and the District Court did not consider the FCA's first-to-file bar (§ 3730(b)(5)). The District Court dismissed Lujan's action, concluding that her allegations were indeed "substantially similar" to Schumer's and, thus, were "based upon" Schumer's "public disclosure." *See* Order Dismissing Relator's Qui Tam Counts (March 19, 1996). Resp. App. at 7.

On appeal, the Ninth Circuit, in *Lujan II*, agreed that Lujan's case was "substantially similar" to Schumer's, and therefore, the "public disclosure" bar applied. *Lujan II*, 162 F.3d at 1033. However, *Lujan II* also found that Lujan alleged sufficient knowledge and disclosure that she qualified as an "original source" under § 3730(e)(4)(B), which exempted her from the "public disclosure" jurisdictional bar. 162 F.3d at 1033-34. Accordingly, the

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[2] Section 3730(e)(4) specifically provides that "no court shall have jurisdiction over an action based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." An original source means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided information to the Government before the filing of an action which is based on the information. 31 U.S.C. § 3730(e)(4)(B).

Ninth Circuit remanded the case "[b]ecause the District Court has subject matter jurisdiction *under the 'original source' exception* to the 1986 FCA." *Id.* at 1034 (emphasis added). Lujan's petition ignores that the decision in *Lujan II* was limited solely to the "public disclosure/original source" determination. *See* Petition at 4.

Because the first-to-file defense, contained in Section 3730(b)(5), had not yet been briefed to the District Court and had not been a basis for the District Court's decision that her action was barred under the "public disclosure" provision, the Ninth Circuit in *Lujan II*, did not address or even mention the first-to-file defense.[3]

When the matter returned to the District Court after *Lujan II*, Hughes was free to assert for the first time before the District Court that Lujan's action was barred by the first-to-file rule under section 3730(b)(5). Lujan raised the same fanciful argument she raises now — that *Lujan II* somehow implicitly decided that she was exempt from the first-to-file rule even though the *Lujan II* decision never mentions that rule or even hints that it was under consideration.

The District Court properly rejected Lujan's reading of the *Lujan II* decision, based on the court's accurate

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[3] Hughes included a short argument about the first-to-file bar in its appellate brief in *Lujan II*, but the court never addressed that argument. Hughes mentioned it again in its petition for rehearing *en banc*, noting that the *Lujan II* panel had completely ignored the first-to-file argument. The Ninth Circuit simply denied Hughes' petition for rehearing without any comment. That notice of denial cannot be interpreted as a consideration and rejection of the first-to-file defense, as Lujan would believe. *See United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (the failure of an appellate court to grant a rehearing "does not indicate the court considered and decided the issue").

recounting of the case's procedural history. The District Court observed that in *Lujan II*:

> [S]ubject matter jurisdiction under § 3730(e)(4) was the only issue squarely presented. While Hughes may have attempted to raise a § 3730(b)(5) argument in its brief and oral argument to the Ninth Circuit, there is no indication in the Ninth Circuit's opinion that it considered the § 3730(b)(5) issue in rendering its decision that subject matter jurisdiction did exist under § 3730(e)(4).

Resp. App. at 14. The District Court correctly concluded that *Lujan II's* silence on the 3730(b)(5) question was not a ruling on the issue but, rather, it was "much more likely that the Ninth Circuit preferred to have the district court address this issue first before making its determination." Resp. App. at 14.

After deciding that it was free to render a decision on whether Lujan's action was barred by the first-to-file rule, the District Court held that her action was indeed barred under that rule. The District Court found that 3730(b)(5) was expressly a first-to-file rule, that Schumer was the first to file, and, because she was the second to file, Lujan's case was foreclosed by that rule.[4] Resp. App. at 14-20.

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[4] The District Court also rejected Lujan's contention—which she repeats in the petition—that Schumer's action was no longer "pending" within the meaning of the FCA. The District Court noted that such a "disingenuous" interpretation would "strip the provision of meaning since both the case law and legislative history of the FCA support the interpretation that § 3730(b)(5) was intended to create a 'first to file' rule . . ." Resp. App. at 14-15.

On appeal, the Ninth Circuit in *Lujan III* agreed with every element of the District Court's opinion. *Lujan III*, 243 F.3d 1181 (9th Cir. 2001). Lujan reiterated her argument that the earlier decision in *Lujan II* had somehow exempted her from the application of the first-to-file rule. She further asserted that this supposed silent holding in *Lujan II* constituted "the law of the case," such that the District Court was precluded from considering the first-to-file issue under § 3730(b)(5).

Lujan III properly rejected Lujan's argument. The Ninth Circuit held that *Lujan II* had not addressed the first-to-file issue and that it was now proper for the court to do so. 243 F.3d at 1186-87. The court noted that the law of the case doctrine "does not apply to issues not addressed by the appellate court." *Id.* Lujan's petition erroneously states that the panel in *Lujan III* found that *Lujan II* was "not controlling." Petition at 5. That is not what *Lujan III* stated or found. Quite simply, the *Lujan III* panel found that "[w]hile Hughes argued a § 3730(b)(5) jurisdictional challenge to this court [in *Lujan II*], we did not explicitly or implicitly decide that issue." 243 F.3d at 1187. Thus, the Ninth Circuit found, in *Lujan III*, that the doctrine of "the law of the case" was not applicable because there had been no prior ruling which would preclude their consideration of the first-to-file issue.[5]

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[5] Moreover, the Ninth Circuit suggested, without discussion, that even if *Lujan II* had, in fact, decided that Lujan was exempt from the first-to-file rule, the court could correct such an obviously erroneous ruling to "prevent manifest injustice." 243 F.3d at 1187. Notwithstanding Lujan's argument (Petition at 10), that *Lujan III* actually applied the "manifest injustice" exception to the law of the case doctrine, the court did not apply that exception. The court merely noted the exception as an alternative. *Id.* at 1187.

Having held that it was proper for the court to consider the application of the first-to-file rule, the court went on to find that Lujan's action was indeed barred by the first-to-file rule. *Id.* at 1187-90.[6] The court rejected Lujan's argument that the first-to-file rule (§ 3730(b)(5)) did not apply in this case because *Schumer*, having been dismissed, was no longer "pending." The court noted that *Schumer* still had been pending at the time Lujan filed her action. 243 F.3d at 1188. The court held that *Schumer's* eventual dismissal did not enable Lujan to proceed with her action. *Id.* The court explained that the FCA's plain language allowed no support for Lujan's convoluted interpretation of the statute which, if accepted, would contravene the FCA's legislative intent of barring duplicative qui tam actions. *Id.*

REASONS FOR DENYING THE PETITION

Pursuant to Rule 10 of this Court, review on a writ of *certiorari* is not a matter of right, but of discretion. Rule 10 identifies several compelling reasons the Court is to consider. These reasons include the entering of a decision by a court of appeals that is in conflict with the decision of another court of appeals "on the same important matter" or "has so far

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[6] The court held that Lujan's action was based on the facts underlying Schumer's earlier action. *Id.* at 1189. Lujan does not suggest in her Petition that the court erred in finding that the material facts alleged in her action were "based on" Schumer's action. The court also rejected Lujan's assertion that her status as an "original source" under § 3730(e)(4)(B), exempted her from the first-to-file rule. The court held that 3730(b)(5) was a first-to-file bar which, by its plain language, offered no original source exception. 243 F.3d at 1187. Having evidently recognized the futility of asking federal courts to amend legislation, Lujan does not overtly repeat that argument in the instant petition. However, she vaguely suggests in the petition that her "original source" status somehow makes her a "proper relator" (Petition at 16), when in fact such status has no bearing under § 3730(b)(5)'s first-to-file rule. *See Lujan III*, 243 F.3d at 1187.

departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." S.Ct. Rule 10(a).

Rule 10 further indicates that the Writ should be denied where a petition asserts error consisting simply of erroneous factual findings or argues that there has been misapplication of a properly stated rule of law. The grant of the writ is reserved for special and significant cases involving important public principles or where there is a real conflict of authority between the circuits. S.Ct. Rule 10.

Lujan does not meet any of these standards. She provides no compelling reason for granting the writ. She presents no conflict among the circuits as to how to interpret the False Claims Act's first-to-file rule. The Ninth Circuit applied a clear and correct interpretation of § 3730(b)(5), holding that because Lujan filed second to Schumer, her claim is barred.

Furthermore, there is no conflict as to the application of the "law of the case" doctrine. Lujan's sole contention in her petition is a distortion of the procedural history of the case—restated over and over as if repetition effects truth. Her claim that the Ninth Circuit failed to follow *Christianson,* which she contends is an applicable and controlling decision of this Court, is entirely lacking in foundation or logic. The Ninth Circuit did not disregard or ignore the law of the case doctrine; rather, it explicitly held that *Lujan II* had not ruled on the § 3730(b)(5) issue. Therefore, *Christianson* was not remotely on point, and there was no law of the case to which the Ninth Circuit could adhere.

Rather than presenting a conflict as to how courts interpret the law of the case doctrine, Lujan's petition, at best, merely challenges whether there was a correct *factual* basis for the Ninth Circuit's holding in *Lujan III* that it was not precluded by the language of its earlier decision in *Lujan*

II from considering the first-to-file question. Such benign claims do not warrant the granting of the writ.

I.

THE NINTH CIRCUIT DID NOT DISREGARD THE LAW OF THE CASE DOCTRINE OR THE *CHRISTIANSON* DECISION

Lujan contends that the Ninth Circuit disregarded the controlling law of the case decision of *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988). Petition at 7. Lujan maintains that *Lujan II's* holding that her claims were not jurisdictionally barred by the public disclosure / original source provision (§ 3730(e)(4)), constitutes an implicit holding that her action necessarily survives any and all other jurisdictional challenges.

This argument is based on her self-serving view, repeated throughout the petition, that *Lujan II* found "that there was subject matter jurisdiction." Petition at 4. She ignores that this finding was expressly limited to the jurisdictional challenge which had been brought under the public disclosure / original source provision (§ 3730(e)(4)). She puts forth an erroneous legal argument that, because Hughes had included the first-to-file (§ 3730(b)(5)) argument in its *Lujan II* brief, the court must have rejected that argument, albeit silently.

Lujan fundamentally misconstrues the *Lujan II* holding. The Ninth Circuit never ruled on the first-to-file question in *Lujan II.* Thus, there was no law of the case or *Christianson* precedent to apply in *Lujan III.* In *Lujan III*, the Ninth Circuit articulated this with certainty:

> While Hughes argued a 3730(b)(5) jurisdictional challenge to this court [in *Lujan II*], we did not explicitly or implicitly decide that issue. Therefore, the law of the case did not foreclose consideration of the 3730(b)(5) jurisdiction issue.

Lujan III, 243 F.3d at 1187. Lujan has no basis to argue that the Ninth Circuit failed to adhere to the law of the case or to the rule of precedential authority set forth in *Christianson* because those rules had no application to begin with in this case.

Lujan's petition, in reality, is challenging only the Ninth Circuit's interpretation of its own prior mandate; *i.e.*, *Lujan III's* interpretation of what had been decided and not decided by *Lujan II*. Even if such a challenge had some factual basis – which it does not – it presents merely an insular and local question lacking any compelling reason for the intervention of this Court. *See Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 950 (Fed. Cir. 1997) (appellate court has plenary power to construe its own mandate) *citing In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895); *Burton v. Johnson*, 975 F.2d 690, 693 (10th Cir. 1992) *cert. denied* 507 U.S. 1043 (1993) (same).

A. The Language of *Lujan II* Makes It Clear That The Court Had Not Addressed Or In Any Way Decided The First-To-File Issue

The *Lujan III* panel correctly interpreted the plain language of the *Lujan II* opinion. *Lujan III* completely rejected Lujan's baseless argument that all FCA jurisdictional challenges were necessarily decided by the Ninth Circuit's limited holding in *Lujan II*. The *Lujan II* panel remanded the case because "the District Court has subject matter jurisdiction under the 'original source' exception to the 1986 FCA." *Lujan II*, 162 F.3d at 1034. The court did not say, as Lujan imagines, that it thereby rejected any and all other jurisdictional challenges or other defenses available to Hughes.

The Ninth Circuit specifically limited its ruling to the § 3730(e)(4) bar. Because there is no "original source"

exception to the first-to-file rule, the court could not possibly have been addressing that rule when it found her to be an "original source."[7] *See* § 3730(e)(4); *Lujan III*, 243 F.3d at 1187. There was no ruling—*sub silentio*, implicit or otherwise—on the 3730(b)(5) / first-to-file issue, as Lujan contends. Petition at 6. The Ninth Circuit expressly limited its holding with respect to the public disclosure / original source provision of § 3730(e)(4).

Lujan asserts that *Lujan II* must have decided the first-to-file issue because it was obligated (or as she says "duty bound") to do so. Petition at 9. However, the *Lujan II* panel was under no such obligation.[8] The unique procedural context of the *Lujan II* appeal, described in detail above, shows why the first-to-file issue was not before the *Lujan II* panel. In sum, the key reason it was not before that panel was that it had not yet been addressed by the District Court. The reason it had not yet been addressed by the District Court is that the *Lujan I* mandate had explicitly directed the District Court to rule on whether her action was barred by the

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[7] It is also clear that the first-to-file rule was not decided in *Lujan II*, because it contains elements and presents a set of questions which are distinct from those presented under the public disclosure / original source rule. *See e.g., United States ex rel. La Corte v. SmithKline Beecham Clinical Laboratories*, 149 F.3d 227, 232-33 (3rd Cir. 1998).

[8] Lujan cites to *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 768 (2000), apparently in support of this errant "duty bound" notion. *Stevens*, however, simply notes that questions of jurisdiction "should" receive priority before a court reaches a *constitutional* issue (in that case the question of whether the action against the state agency was barred under the Eleventh Amendment). *Id. Stevens* does not stand for Lujan's expansive proposition that a court must consider all jurisdictional challenges simultaneously – even jurisdictional challenges which are not yet properly before the court – or else lose the opportunity to address them.

public disclosure / original source provision (§ 3730(e)(4)). *Lujan I*, 67 F.3d at 248. The District Court took that directive literally and ordered the parties to brief only that particular issue. *See* Resp. App. at 1-2. Consequently, that was the only issue briefed by the parties and decided by the District Court at that time.

When the public disclosure / original source dismissal came up for review in *Lujan II*, the Ninth Circuit had no basis to address the first-to-file issue because it had not been part of the District Court's determination. *See Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939) (issues before appellate court are limited to those "disposed of in the main litigation"); *Engel Industries, Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382 (Fed. Cir. 1999) ("The scope of issues presented to [the appellate court] on appeal must be measured by the scope of the judgment appealed from . . . ."). Accordingly, the *Lujan II* panel had only the public disclosure bar/original source exception issue properly before it.

Notwithstanding that Hughes raised the first-to-file issue (§ 3730(b)(5)) for the first time in its brief in *Lujan II*, and repeated the issue at oral argument, the *Lujan II* panel still was not obligated to and, more importantly, did not address that issue in any way, shape or form.[2] The *Lujan II* ruling on the public disclosure / original source issue did not remotely suggest that the court also ruled on the first-to-file

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[2] Hughes had suggested in *Lujan II* that the first-to-file rule would be an alternative basis for upholding the dismissal of the action. Although consideration of that issue in *Lujan II* would have expedited the litigation by avoiding another trip to the District Court, the Ninth Circuit was not obligated to short-cut the process. Indeed, as the District Court later noted, it was "much more likely that the Ninth Circuit merely preferred to have the district court address this issue first before making its determination." Resp. App. at 14.

issue. Therefore, the decision did not establish any law of the case with respect to the first-to-file rule. *See United States v. Cote*, 51 F.3d at 181 (holding that law of the case preclusions "clearly do[] not extend to issues an appellate court did not address"). Indeed, as occurred here, "[q]uestions that merely could have been decided do not become law of the case." *Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 806 (D.C. Cir. 1984). The Ninth Circuit's *opportunity* to address § 3730(b)(5) did not transform into an *actual resolution* of the issue.

B. *Christianson* Does Not Control *Lujan III*

Lujan insists that *Christianson* stands for the proposition that a decision by a court to transfer or remand a case to another court "necessarily involves a decision that the recipient court has jurisdiction." Petition at 7. According to Lujan, then, the court's remand in *Lujan II* was an automatic holding that no other jurisdictional challenges could ever be raised in the case. Lujan's reading of *Christianson* is wrong. Moreover, the circumstances and the holding of *Christianson* are distinguishable from the instant action on several levels, and therefore *Christianson* is not controlling in the instant action.

The particular jurisdiction issue in *Christianson* was whether the proper forum for the action was the Federal Circuit under its patent law jurisdiction (28 U.S.C. §§ 1295, 1338). That issue was fully briefed by the parties, and the Federal Circuit expressly decided that it did not have patent law jurisdiction. Accordingly, it transferred the case to the Seventh Circuit. The Federal Circuit's transfer order did not bother to explain why there was no jurisdiction because it expected "that the parties and others interested would recognize that it was based on the reasons and authorities set forth in the movant's brief." *Christianson v. Colt Indus. Operating Corp.*, 822 F.2d 1544, 1549 (Fed. Cir. 1987).

When the Seventh Circuit received the transferred case, it revisited the exact same jurisdiction question and

held that the Federal Circuit was wrong and that the Federal Circuit did have patent law jurisdiction. The Seventh Circuit then transferred the case back to the Federal Circuit. *See Christianson v. Colt Indus. Operating Corp.*, 798 F.2d 1051, 1056-57, n.4 (7th Cir. 1984).

When the matter reached the Supreme Court, the Court held that it was improper for the Seventh Circuit to have revisited the Federal Circuit's determination of lack of jurisdiction. *Christianson*, 486 U.S. at 817. The Federal Circuit's decision was the law of the case, and the Seventh Circuit was not empowered to reverse that decision. *Id.* Thus, *Christianson* applied the law of the case doctrine in the unique setting of an inter-circuit transfer.[10]

The particular circumstance in *Christianson* is not remotely relevant to what occurred in this instant action where the District Court and then the Ninth Circuit simply interpreted the scope of the Ninth Circuit's prior mandate. In invoking *Christianson*, Lujan again imagines a holding that is not in that decision.

The Federal Circuit in *Christianson,* did not "implicitly or necessarily" decide the jurisdiction challenge that was before it; the Federal Circuit decided the question explicitly. Nevertheless, Lujan seizes upon the fact that the Federal Circuit's transfer order did not explain the court's reasoning. From this, Lujan draws the unfounded conclusion that the Supreme Court adopted a universal rule that *every* aspect of jurisdiction must necessarily be decided by

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10 *See Christianson*, 486 U.S. at 816 ("[T]he policies supporting the [law of the case] doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation").

implication in any remand decision involving a question of jurisdiction. *See* Petition at 7 (arguing that *Christianson* is "controlling and dispositive authority that in remanding Lujan's qui tam claims to the District Court in 1998, *Lujan II* had implicitly decided and rejected Hughes' § 3730(b)(5) jurisdictional challenge").

Instead, *Christianson* stands for the limited principle that the law of the case will apply to an actual decision on jurisdiction which results in an inter-circuit transfer of jurisdiction. *Christianson* does not hold that all potential statutory jurisdictional challenges are necessarily decided upon a remand to a district court where the appellate court ruled upon a narrow and separate jurisdictional challenge.[11] Simply put, *Christianson* has no bearing upon *Lujan III.*

II.

NO CIRCUIT CONFLICT EXISTS REGARDING THE APPLICATION OF *CHRISTIANSON*

Review by this Court is not warranted where there is no significant split in circuit decisions. S.Ct. Rule 10; *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951) (noting that *certiorari* is granted only in cases where there is "a real and

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[11] Even if the Ninth Circuit had misapplied *Christianson* as Lujan contends, *certiorari* still is not warranted because she does not charge that the Ninth Circuit stated an improper rule of law. Her contention is merely that the court misapplied a rule of law. Petition at 9. She further asserts that "Neither of the two [manifest injustice] prongs were satisfied here" (Petition at 10), and that this Court should now make a "proper determination" regarding the manifest justice exception to correct the Ninth Circuit misapplication (Petition at 16). Rule 10 provides that "*certiorari* is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." From such insignificant seeds, Supreme Court cases should not flourish.

embarrassing conflict of opinion and authority" between the circuits). In her desperate attempt to meet this standard, Lujan invents a "split" where there is none. *See* Petition at 6 ("there is a clear and acknowledged split among the circuits on whether *Christianson* is confined solely to instances in which a court of appeals orders a transfer or whether its scope is broader").

Lujan contends that there is a "split of authority in the federal circuits regarding the law of the case doctrine." Petition at 8. The purported "split" which Lujan mischaracterizes involves a Third Circuit case which stated that "*Christianson's* discussion of the law of the case, as it relates to jurisdiction . . . appl[ies] only to transfer cases and not to cases that raise serious jurisdictional concerns." Petition at 8, *quoting Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 118 (3rd Cir. 1997). Lujan further quotes the Third Circuit as recognizing that two other circuits have held that the law of the case doctrine is not limited to inter-circuit transfer cases but applies generally to decisions involving subject matter jurisdiction. Petition at 8.

Notwithstanding the Third Circuit's observation about the application of *Christianson* in two other circuits, the Third Circuit simply ruled that the law of the case did not apply to the specific jurisdictional question at issue in that case because of "extraordinary circumstances;" *i.e.*, the presentation of new evidence. *Public Interest*, 123 F.3d at 118. In that regard, the Third Circuit did not disagree with its sister circuits; rather, it found that the law of the case did not apply in the factual circumstances under consideration: "[W]e do not think that law of the case is applicable in this instance to prevent our reconsideration of standing, particularly in view of the fact that new evidence . . . was presented to the district court which had a direct bearing on the issue of standing" *Id.*

Thus, *Public Interest* did not create a split of authority among the circuits. But even if there were such a

split as Lujan contends, it would have no bearing whatsoever on the *Lujan III* decision. The Ninth Circuit did not split from any circuit--or ignore any circuit split--concerning *Christianson*. The scope of *Christianson* was never before the Ninth Circuit in *Lujan III*. Indeed, the Ninth Circuit--like the Third Circuit in *Public Interest*--found that the law of the case doctrine did not apply to the jurisdiction question because it did not operate as "to issues not addressed by the appellate court." *Lujan III*, 243 F.3d at 1190. Neither *Lujan III* nor *Public Interest* conflict with *Christianson* which held that for the law of the case doctrine to apply, "the issue in question must have been decided explicitly or by necessary implication in [the] previous action." 486 U.S. at 815-16.

Lujan III's straightforward determination that there was no prior law of the case in this instance put that issue completely outside the scope of *Christianson*. Thus, the Ninth Circuit decision did not conflict with any other circuit on the question, and there is no "split" arising from *Lujan III*.

III.

LUJAN'S CLAIM THAT THE *SCHUMER* ACTION WAS NEVER "PENDING" WITHIN THE MEANING OF THE FCA IS UNSUPPORTED AND DOES NOT COMPEL GRANTING THE WRIT

Lujan's asserts (Petition at 11), that the disposition of the *Schumer* action rendered it a "nullity," and therefore *Schumer* was never a "pending" action, as that term is used in § 3730(b)(5) (". . . no person may bring a related action based on facts underlying *the pending action*") (emphasis added). Lujan's assertions are based on her misstatements of

the facts and procedural history of the *Schumer* action.[12] They raise no circuit conflict or otherwise frame instances in which the Ninth Circuit departed from "the accepted and usual course of judicial proceedings." S.Ct. Rule 10(a).

A. *Schumer* Was Never a "Nullity"

Lujan's assertion that Schumer's action was dismissed for lack of jurisdiction is a false representation of the outcome of that action. As described in detail above, this Court's holding in *Schumer* that the District Court lacked jurisdiction—the ruling upon which Petitioner relies for its "nullity" argument—applied only to Schumer's pre-1986 allegations. This Court's ruling in *Schumer* left untouched Schumer's post-1986 claims which the District Court had dismissed as a result of summary judgment on the merits. Because the Ninth Circuit had affirmed the dismissal on the merits of Schumer's post-1986 claims, they were not within the scope of Hughes' appeal to the Supreme Court and consequently were not disposed of on grounds of lack of jurisdiction. *See Schumer*, 63 F.3d at 1528.

Thus, the procedural record of *Schumer* demonstrates that it was not transformed into a "nullity" by this Court on the basis of a jurisdictional defect, because that defect was applied only to Schumer's pre-1986 claims. Moreover, with regard to Lujan's novel argument that a case which is dismissed in its entirety for lack of jurisdiction should not be considered as a "pending action" for purposes of § 3730(b)(5)'s first-to-file rule, Hughes notes that no court has ever made such a ruling.

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12 Hughes' counsel in the instant action also represented Hughes in the *Schumer* action before the District Court and the Ninth Circuit.

Not only does Lujan blatantly misapply the facts on this issue, she relies, as she did before the Ninth Circuit, upon an inapposite and unpublished non-FCA case, *Drake v. Cheney*, No. 91-1553, 1992 U.S. App. LEXIS 7298 (4th Cir. 1992), whose use the Fourth Circuit expressly disfavors. Petition at 10; Fourth Cir. R. 36(c).[13].

B. Lujan's Interpretation of "Pending" Contorts FCA Policy

Lujan contends that once a qui tam case is over, the first-to-file rule no longer applies, and a subsequent relator is invited to file a second duplicate action. Petition at 12-13. In that regard, she asserts that a case that is ended can no longer be deemed to have been "pending." Lujan's contorted interpretation of the term "pending" conflicts with the basic purposes of the statutory limitations on who can properly bring a qui tam action under the FCA. Indeed, Lujan's view is nonsensical.

The FCA was intended to prevent duplicative lawsuits and class actions. *See* Senate Report No. 99-345, 99th Cong. 2nd Sess. 6, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290; *United States ex rel. Stinson, Lyons et al. v. Prudential Insurance*, 944 F.2d 1149, 1154 (3d Cir. 1991). Section

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13 Curiously, Lujan again relies on *Drake v. Cheney* in spite of the Fourth Circuit Rule disfavoring such reliance while, at the same time, criticizing the *Lujan III* court for "relying" upon *United States ex rel. Pentagen Technologies International, Ltd. v. CACI International Inc.*, 172 F.3d 39 (2d Cir. 1999), an unpublished Second Circuit opinion. Lujan again makes a blatant mischaracterization. *Lujan III* did not "rely" upon *Pentagen*. The *Lujan III* panel simply noted—in a footnote—that other circuits have not directly decided whether a subsequently dismissed action is "pending" under 3730(b)(5) and indicated-without reliance--that the Second Circuit had referenced the question in an unpublished opinion (*Pentagen*). *Lujan III*, 243 F.3d at 1193, n.11.

3730(b)(5) plainly awards the winner of the race to the courthouse; 3730(b)(5) is a first to file rule. *See Stinson*, 944 F.2d at 1176 n.5 (Scirica, J. dissenting); *see also, United States ex rel. Taxpayers Against Fraud and Walsh v. General Electric Co.*, 41 F.3d 1032, 1035 (6th Cir. 1994) (section 3730(b)(5) bars relator from collecting bounty if someone else filed first claim).

The first to file rule is all the more important as a protection against multiple suits because there can be more than one "original source." *See United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 410 (9th Cir. 1993) *cert. denied* 511 U.S. 1033 (1994); *Stinson*, 944 F.2d at 1176, n.5 (Scirica, J. dissenting). Accordingly, Lujan errs in implying that FCA policy regarding 3730(b)(5) is on her side. She asserts that "Congress certainly did not intend that relators should have no bite at the apple." Petition at 13. But Schumer, who was the first-to-file had his bite, and he lost.

Lujan also claims that she is a "proper relator" and that it is a "perverse contention" to preclude her from bringing an action that can benefit the public.[14] Petition at 16 ("nothing supports the perverse contention that Congress intended that a suit that is a nullity should preclude a proper relator from bringing an action that can benefit the public"). This reference to the merits of her claims, while not pertinent to the issue set forth in the petition, is itself baseless. The Government determined long ago that the cost charging in question actually saved the Government money. *See Lujan*

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[14] Such overstatement reflects desperation; it is hardly applicable given that the District Court and all three members of the Ninth Circuit panel found Lujan not to be a proper qui tam relator. Indeed, in the long history of Schumer's and Lujan's actions, fourteen different federal judges have noted that Lujan's allegations mirror those pursued earlier by Schumer.

III, 243 F.3d at 1187, n.10; *Schumer*, 520 U.S. at 942-43, fn.1.

Lujan further asserts that Hughes is not "in any way prejudiced in having to defend against Lujan's qui tam claims." Petition at 15. That is an absurd contention. Hughes would indeed be prejudiced by having to defend a case which it already won.

CONCLUSION

Respondent Hughes Aircraft Company respectfully requests that, for the reasons stated above, this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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October 23, 2001

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. LINDA A. LUJAN, Plaintiffs, v. HUGHES AIRCRAFT CO., Defendant.	CV-92-1282 JMI (SHx) ORDER RE BRIEFING OF ISSUES UPON REMAND (Filed December 13, 1995)

IT IS HEREBY ORDERED:

Upon remand of this action from the Ninth Circuit Court of Appeals, the Court makes the following ruling. As the Ninth Circuit noted, this Court first must determine whether it has jurisdiction. 31 U.S.C. § 3730(e)(4)(A) circumscribes district courts' jurisdiction in qui tam actions by barring suits brought after the allegations in the complaint have been publicly disclosed, unless the relator is the "original source" of the information.

The Ninth Circuit stated that Plaintiff Linda Lujan's ("Lujan") allegations resemble the subject of an earlier qui tam action brought in 1989 by William Schumer ("Schumer"), the former Hughes director of contracts for the B-2. On remand, this Court initially must make a factual inquiry to determine whether the allegations in Lujan's complaint were publicly disclosed by Schumer.

In order to determine this issue, the Court orders the parties to brief this issue. Since Defendant already has filed a short brief discussing this issue, the Court now orders

Defendant to file a complete brief addressing this issue no later than Monday, January 22, 1996. Plaintiffs' response, if any, is due no later than Monday, January 29, 1996. Defendant's reply, if any, is due no later than Monday, February 5, 1996.

After the Court has resolved this issue, it will then set a schedule, if necessary, for any remaining issues.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. LINDA A. LUJAN, Plaintiffs, v. HUGHES AIRCRAFT CO., Defendant.	CV-92-1282 JMI (SHx) ORDER DISMISSING RELATOR'S QUI TAM COUNTS (Filed March 19, 1996)

IT IS HEREBY ORDERED:

This Court is in receipt of the parties' briefing re subject matter jurisdiction in the above-entitled action. The Court **DISMISSES** Plaintiff Linda A. Lujan's ("Lujan" or "Relator") *qui tam* counts. Lujan's claim for retaliation remains viable.

BACKGROUND

Lujan worked for Defendant Hughes Aircraft Co. ("Hughes") as an accountant and as a systems analyst. *See* First Amended Complaint ("FAC"), ¶ 12. Lujan filed *qui tam* and retaliation claims against Hughes. Lujan alleges that Hughes mischarged the Government for its work on the B-2 bomber radar systems. The Government declined to intervene. United States *ex rel.* Lujan v. Hughes Aircraft Co., 67 F.3d 242, 244 (9th Cir. 1995).

This Court dismissed Lujan's complaint because Lujan disclosed the nature and existence of her *qui tam* claim to the Los Angeles Times while the complaint was still under

seal. Lujan's action clearly violated the seal provisions of 31 U.S.C. § 3730(b)(2). *Id.*

However, this Court did not explicitly discuss the authority upon which it rested its decision to dismiss. As such, the Ninth Circuit's holding requires this Court to evaluate several factors in determining the appropriate sanction.[1]

But, the Ninth Circuit noted that this Court first must determine whether it has jurisdiction. *Id.* at 248. Section 3730(e)(4)(A) of the False Claims Act circumscribes district courts' jurisdiction in *qui tam* actions by barring suits brought after the allegations in the complaint have been publicly disclosed, unless the relator is the "original source" of the information. *See* 31 U.S.C. § 3730(e)(4)(A)-(B).

The Ninth Circuit stated that Lujan's allegations resemble the subject of an earlier *qui tam* action brought in 1989 by William Schumer, the former Hughes director of contracts for the B-2. Lujan, 67 F.3d at 248. On remand, this Court initially must make a factual inquiry to determine whether the allegations in Lujan's complaint were publicly disclosed by Schumer. *Id.*

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[1] Factors to consider under the false Claims Act include: (1) harm to the government; (2) nature of the violation, (3) presence or absence of bad faith or willfulness. Factors to consider under the Court's inherent power to dismiss an action include: (1) the existence of extraordinary circumstances, (2) bad faith or willfulness, (3) efficacy of lesser sanctions, (4) relationship between the misconduct and the matters in controversy, (5) prejudice to the party victim of the misconduct, and (6) government interests at stake. Lujan, 67 F.3d at 245-48.

DISCUSSION

A. The operative complaint for review is Plaintiff's First Amended Complaint.

Hughes strenuously argues that the relevant complaint for review is the original one, not the first amended one. Hughes is wrong.

Hughes argues that since the Court never had subject matter jurisdiction over the original complaint, a fortiori this Court lacks jurisdiction over the amended complaint. Hughes also maintains that Lujan's independent retaliation claim, 31 U.S.C. § 3730(h), fails to confer subject matter jurisdiction upon this Court. But, Hughes offers neither support nor cogent reasoning to support either assertion.

Moreover, Hughes' assertion appears somewhat disingenuous in light of the fact that one of Hughes' briefs submitted before the Ninth Circuit stated that "Hughes maintains that the operative complaint for determining the jurisdictional issue is the First Amended Complaint." *See* Appellee Hughes Aircraft Company's Supplemental Brief on Issue of Jurisdictional Bar Under 31 U.S.C. § 3730(e)(4)(A), p. 4 n.5.

In sum, the Court's analysis is based on Lujan's First Amended Complaint, as the retaliation claim itself is, and always has been, an independent jurisdictional basis. *See* 31 U.S.C. § 3730(h) ("An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection); 28 U.S.C. § 1331.

B. Jurisdictional statute's interpretation

The relevant jurisdictional statute at issue is 31 U.S.C. § 3730(e)(4), which provides:

> (A) No court shall have jurisdiction over an action under this section based upon the

> public disclosure of allegations or transactions in a criminal, civil, or administrative hearing . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under the section which is based on the information.

In interpreting such a jurisdictional statute, the Court is mindful that "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction." United States *ex rel.* Precision Co. v. Koch Industries, 971 F.2d 548, 552 (10th Cir. 1992) (citation omitted).

1. "Based upon"

In interpreting this statute, several legal formulations have evolved to determine when one relator's allegations are "based upon" another relator's earlier allegations. For example, the Ninth Circuit has stated that "based upon" means when "fairly characterized[,] the allegation repeats what the public already knows." United States *ex rel.* Wang v. FMC Corp., 975 F.2d 1412, 1417 (9th Cir. 1992). Another circuit has held that a relator's disclosures are "based upon" previous disclosures if they are "based in any part" on the prior allegations. Koch Industries, 971 F.2d at 553.

2. "Publicly disclosed"

Allegations or transactions are publicly disclosed if they are transmitted or available not only through newspapers, radio and other mass media outlets, but also

through court files and court-filed discovery. *See* United States *ex rel.* Kreindler v. United Technologies, 985 F.2d 1148, 1158 (2d Cir. 1993); United States *ex rel.* Schumer v. Hughes Aircraft, 63 F.3d 1512, 1519-20 (9th Cir. 1995).

3. Analytical framework

Applying the aforementioned definitional frameworks, the Ninth Circuit has promulgated the following rule:

> If [] someone republishes an allegation that already has been publicly disclosed, he cannot bring a *qui tam* suit, even if he had "direct and independent knowledge" of the fraud. He is no "whistleblower." A "whistleblower" sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a "conspiracy of silence,"[2] and not their mimics.

Wang, 975 F.2d at 1419 (citations omitted).

C. Lujan echoed Schumer's allegations

Relator Lujan's *qui tam* allegations are substantially similar to Schumer's previous claims. Lujan attempts to distinguish her allegations by stating that they involve mischarging within the B-2 program, while Schumer addressed cost shifting among the B-2 program and other aircrafts.[3] However, upon reviewing the allegations previously brought forth by Schumer, the Court finds that Lujan's allegations are simply a variation on Schumer's.

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[2] The parties do not dispute that Lujan has direct and independent knowledge of her allegations.

[3] These aircrafts are the F-14D, the F-15 MSIP, and the F-18.

Schumer's claims, like Lujan's, involve the B-2 bomber system, which was a massive, billion dollar contract. With such large stakes at hand, the government necessarily performed a thorough review of Schumer's claims as evidenced by the Schumer records and proceedings. Lujan now seeks to create a meaningless distinction between her claims and Schumer's in order to further the government's, and her, interests.

To give credence to Lujan's microscopically fine distinctions between her allegations and those of Schumer would do injustice to the purposes underlying the False Claims Act. Wang, 975 F.2d at 1419 (citations omitted). It is the harbinger, not the mimic, who is entitled to champion the government's interests. In sum, the Court DISMISSES all of Lujan's *qui tam* claims.

Lujan's claim for retaliation under 31 U.S.C. § 3730(h) remains viable.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.* LINDA A. LUJAN, Relator, v. HUGHES AIRCRAFT COMPANY, Defendant.	CV-92-1282 SVW ORDER GRANTING DEFENDANT'S MOTION TO DISMISS (Filed January 20, 2000)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

I. Background

Hughes Aircraft Company ("Hughes") is presently moving to dismiss Linda Lujan's ("Lujan") qui tam action, arguing that it is barred by section 3730(b)(5) of the False Claims Act ("FCA") which prohibits any person other than the government from bringing a related action based on the facts underlying a qui tam action that has been previously filed. *See* 31 U.S.C. § 3730(b)(5). Hughes contends that Lujan's action is related to a previously filed qui tam action brought by William Schumer in 1989 ("Schumer action"). Because of the importance of Schumer's action to the present motion, the history of the Schumer Case is provided below.

A. The Schumer Action

Schumer's action alleged that Hughes had mis-charged costs on the radar systems of four different aircraft

programs — the B-2, F-15, F-14 and F-18 — during its participation as a defense contractor between 1982 and 1990. Schumer alleged that Hughes used cost sharing agreements called "commonality agreements" to shift costs from "fixed-priced" contracts to "cost reimbursement" contracts. The government conducted an audit of this practice in 1986 and 1988 and concluded that Hughes had overcharged the government. However, in 1989-90, the government reversed its earlier findings and determined that Hughes' commonality agreements were proper and actually saved the government money.

On May 20, 1992, Judge Pfaelzer granted summary judgment in favor of Hughes, finding that "Schumer has not shown that Hughes violated the False Claims Act." On appeal, the Ninth Circuit affirmed most of Judge Pfaelzer's findings, remanding only on two narrow issues concerning Hughes conduct prior to 1986: (1) whether Hughes failed to timely disclose the 1982 commonality agreement to Northrop, and (2) whether Hughes failed to reflect the commonality charging practice in its accounting disclosure statement to the Government between December 1982 and January 1984. *See* United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1523-23 (9th Cir. 1995).

When Schumer appealed the grant of summary judgment to the Ninth Circuit, Hughes cross-appealed on another issue. Hughes had argued unsuccessfully in the district court that because government auditors had alleged the same mischarging prior to Schumer filing his action, the action was barred under the "government knowledge" defense. 31 U.S.C. § 3730(b)(4) (1982). This defense was eliminated by the 1986 amendments to the FCA. However, Hughes argued that the amendments should not be applied retroactively to Hughes' pre-1986 conduct. The Ninth Circuit disagreed with Hughes and held that the 1986 Amendment which eliminated the government knowledge defense applied retroactively to Hughes' pre-1986 conduct because it did not affect a "substantive right." United States *ex rel.* Schumer, 63 F.3d at 1516-17.

Hughes appealed to the Supreme Court, and certiorari was granted with respect to: (1) whether the 1986 Amendments applied to pre-1986 conduct, (2) whether any of Schumer's claims were jurisdictionally barred by the Public Disclosure provisions of the FCA, and (3) whether the two issues that the Ninth Circuit had remanded — concerning the alleged disclosure infractions from 1982-84 — could possibly give rise to a FCA violation in view of the government's determination that there was no financial harm to the government.

The Supreme Court held that the 1986 amendments did not apply retroactively and thus, Schumer's pre-1986 claims were barred by the government knowledge defense which was present in the 1982 version of the FCA. Because the only claims remaining after the Ninth Circuit's ruling were pre-1986 claims, the entire case had to be dismissed. Therefore, the Supreme Court declined to reach the remaining issues presented for review.

B. Lujan's Action

Lujan filed this *qui tam* action against her previous employer, Hughes, in 1992. Like Schumer, she alleged that Hughes submitted false claims to the government during its participation as a defense contractor in the B2 bomber and other projects between 1982 and 1989.

Apparently, soon after filing the action, Lujan's previous counsel brought the case to the attention of the media, in violation of the 60-day sealing provision in the statute. Hughes brought a motion to dismiss the action based on this violation. Judge Ideman, who previously had this case, granted dismissal on that basis.

The Ninth Circuit reversed Judge Ideman's decision, directing the district court to evaluate whether a lesser sanction may have been appropriate and providing some guidelines for this inquiry. In addition, the Ninth Circuit noted that this action appeared to be quite similar to the

Schumer action and, *sua sponte*, directed the district court to consider whether Lujan's case was jurisdictionally barred based on § 3730(e)(4) of the False Claims Act.

Section 3730(e)(4) is a jurisdictional provision that bars qui tam actions which are "substantially similar" to allegations that were previously disclosed to the public. The Ninth Circuit directed the district court to consider whether the Schumer action resulted in public disclosure of the allegations in Lujan's action and therefore barred the Lujan action.

The district court directed the parties to brief the "public disclosure" issue and eventually dismissed Lujan's action for lack of subject matter jurisdiction based on § 3730(e)(4). On appeal, the Ninth Circuit reversed the district court's decision, finding that while the Schumer action was substantially similar to the Lujan action and thus, the Schumer action constituted public disclosure of Lujan's allegations, Lujan's action was not barred because Lujan fell within the exception to the public disclosure rule because she was an "original source" of the allegations. The Ninth Circuit also determined that Lujan could only maintain allegations arising from false claims submitted by Hughes after 1986. This ruling was based on the Supreme Court's decision in Schumer which held that the 1986 amendments to the FCA did not apply retroactively and thus, false claims which arose prior to 1986 were subject to the 1982 jurisdictional provisions which barred claims based upon information of which the government was already aware.

At this point Lujan's case has been remanded once again from the Ninth Circuit. Lujan's allegations have been limited by the Ninth Circuit to allegedly false claims submitted by Hughes between 1986 and 1989. Defendant Hughes now brings another motion to dismiss based on lack of subject matter jurisdiction under § 3730(b)(5) of the FCA, res judicata, and collateral estoppel.

II. Lujan's Action Is Barred By Section 3730(b)(5)

A. Section 3730(b)(5)

Section 3730(b)(5) states: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." (emphasis added)

B. The Ninth Circuit Did Not Implicitly Reject Hughes' Section 3730(b)(5) Defense

Lujan argues that Hughes already presented this jurisdictional defense to the district court and the Ninth Circuit and lost. Therefore, Lujan contends, Hughes is barred from rearguing the issue now. Lujan's contentions are based on the fact that Hughes argued this issue to the district court and the Ninth Circuit. However, a look at the interesting manner in which this issue arose, coupled with a close reading of the district court and Ninth Circuit orders, makes clear that neither court addressed or "implicitly" decided this issue.

As discussed previously, when the Ninth Circuit reversed the district court's dismissal based on violation of the sealing provision, it directed the district court to consider whether Lujan's action was barred based on lack of subject matter jurisdiction under section 3730(e)(4) because the allegations in Lujan's complaint were similar to those publicly disclosed in the Schumer action. In the district court's "Order Re Briefing of Issues Upon Remand," the parties were directed to brief this specific issue. The district court granted dismissal based on lack of subject matter jurisdiction pursuant to § 3730(e)(4). Regardless of whether Hughes attempted to argue that the case should have been dismissed based on lack of subject matter jurisdiction under § 3730(b)(5) as well, it is clear that the district court based its decision solely on § 3730(e)(4) and did not mention or discuss § 3730(b)(5).

When the dismissal was appealed to the Ninth Circuit, subject matter jurisdiction under § 3730(e)(4) was the only issue squarely presented. While Hughes may have attempted to raise a § 3730(b)(5) argument in its brief and oral argument to the Ninth Circuit, there is no indication in the Ninth Circuit's opinion that it considered the § 3730(b)(5) issue in rendering its decision that subject matter jurisdiction did exist under § 3730(e)(4).

Plaintiff argues that the Ninth Circuit's very silence implies that it rejected the defendant's argument. However, it is much more likely that the Ninth Circuit merely preferred to have the district court address this issue first before making its determination. Therefore, this court does not find Lujan's contention that the Ninth Circuit implicitly rejected Hughes § 3730(b)(5) persuasive.

C. Section 3730(b)(5) Applies To This Action Because Schumer's Action Was Pending At The Time Lujan Filed Her Case

Plaintiff argues that § 3730(b)(5) applies only when another action is "pending" and that because Schumer's action was dismissed in 1997, there is no action pending which would bar Lujan's action. This argument is disingenuous.

Schumer's action was pending at the time that Lujan filed her claim. Therefore, under the plain meaning of the statute, Lujan's action is barred if the Court determines that it is related to the Schumer action because Lujan brought this lawsuit while the Schumer action was pending. Plaintiff's suggested interpretation of § 3730(b)(5) would strip the provision of meaning since both the case law and legislative history of the FCA support the interpretation that § 3730(b)(5) was intended to create a "first to file" rule which would prevent multiple separate suits based on the same claims. *See, e.g.*, United States *ex rel.* Erickson v. American Institute of Biological Sciences, 716 F. Supp. 908, 918 (E.D. Va. 1989). To allow subsequent qui tam lawsuits

to be filed as long as the previously-filed qui tam actions had been dismissed would be entirely contrary to the goals of § 3730(b)(5). Thus, the Court rejects this argument.

D. Lujan's Claims Are Related To Schumer's Claims

1. Standard For Determining Related Claims Under Section 3730(b)(5)

Section 3730(b)(5) has been interpreted as a "first to file" rule which sets a jurisdictional bar to any related *qui tam* action. *See* United States *ex rel.* Erickson v. American Inst. of Biological Sciences, 716 F. Supp. 908, 918-19 (E.D. Va. 1989). One of the purposes of the 1986 amendments, which altered the jurisdictional barriers to bringing a qui tam lawsuit, was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 345, 99th Cong., 2d Sess. 1, *reprinted in* 1986 U.S.C.C.A.N. at 5266. The amendments were also an attempt "to clarify in the statute that private enforcement under the civil False Claims Act is not meant to produce class actions or multiple separate suits based on identical facts and circumstances." *Id.* at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6290, *see also* United States *ex rel.* Taxpayers Against Fraud and Walsh v. General Electric Company, 41 F.3d 1032, 1035 (6th Cir. 1994).

While courts have been anything but uniform in interpreting what constitutes a related case under section 3730(b)(5), most courts have rejected an identical facts test. *See* United States *ex rel.* Capella v. United Technologies Corp., 1999 W.L. 464546 at *8 (D. Conn. June 3, 1999) (analyzing tests applied by other courts). The Third Circuit's test focuses on whether the "later filed allegation states all the essential facts of a previously-filed claim." United States *ex rel.* LaCorte v. Smithkline Beecham Clinical Laboratories, Inc., 149 F.3d 227, 232-33 (3d Cir. 1998). If the claim is based on the same essential facts or circumstances, it is barred regardless of the fact that the allegations

"incorporate[] somewhat different details." *Id.* Similarly, Judge Kenyon, of the Central District of California, concluded that § 3730(b)(5) bars claims to the extent that they raise "issues which were the subject of the [prior action]." Hyatt v. Northrop Corp., 1989 U.S. Dist. LEXIS 18941, at *2. The Eleventh Circuit has also indicated, although in dicta, that qui tam cases based on "the same type of conduct would be barred." United States *ex rel.* Cooper v. Blue Cross and Blue Shield of Florida, Inc., 19 F.3d 562, 567 (11th Cir. 1994). In United States *ex rel.* Erickson, a lower court in Virginia adopted a somewhat different two-part test under § 3730(b)(5): "A subsequently filed qui tam suit may continue only to the extent that it is (a) based on facts different from those alleged in the prior suit and (b) gives rise to a separate and distinct recovery by the government." 716 F. Supp. at 918. While all of these cases apply a somewhat different standard in determining whether a subsequently filed qui tam case is barred under § 3730(b)(5), "they contain one common principle – section 3730(b)(5) precludes a subsequent relator's claim that alleges the defendant engaged in the same type of wrongdoing as that claimed in a prior action even if the allegations cover a different time period or location within a company." United States *ex rel.* Capella v. United Technologies Corp., 1999 WL 464536, *9 (D. Conn. June 3, 1999).[1]

The First Circuit has adopted quite a different approach: "We think a court should look first to whether the

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[1] Lujan argues that section 3730(b)(5) only precludes a subsequently filed qui tam suit based on identical facts. Plaintiff relies solely on United States *ex rel.* Dorsey v. Warren E. Smith Community Health/Mental Retardation & Substance Abuse Centers, C.A. No. 95-7446, 1997 U.S. Dist. LEXIS 9424 (E.D. Pa. June 25, 1997) for this proposition. Dorsey appears to be the only court to have adopted such a stringent standard and it seems that Dorsey is no longer good law since more recent Third Circuit opinion in LaCorte appears to overrule it.

two cases can properly be seen as having a host-parasite relationship. In answering the question, we think it would be useful . . . [to] ask whether the qui tam case is receiving 'support, advantage, or the like' from the host case. . . ." United States *ex rel.* S. Prawer & Co. v. Fleet Bank of Maine, 24 F.3d 320, 327 (1st Cir. 1994) (internal citations omitted). The First Circuit's analysis was in connection with § 3730(e)(3) which bars a qui tam suit based upon transactions or allegations which are the subject of another suit in which the government is a party. However, the same analysis could clearly apply under § 3730(b)(5) and, in fact, one district court has held that this host-parasite analysis may be useful in analyzing § 3730(b)(5) cases. *See* Capella, 1999 WL 464536, *8-9. The First Circuit indicated that where a host-parasite relationship was found, an identity between the later filed qui tam action (the "parasite") and the earlier case (the "host") could be presumed, while the lack of a host-parasite relationship would indicate there was no identity between the two cases. *Id.* at 328.

While the Court agrees that the existence of a host-parasite type relationship might generally be indicative of whether the later filed qui tam action is "related to" or based upon the same facts as the previously filed case, the Court does not find this test particularly helpful. Under this test, two or even ten relators who had independent knowledge of a scheme to submit false claims to the government could all file suit based on identical facts. None of the relators would be receiving support or advantage from any of the other relators because of their independent knowledge. Therefore, no host-parasite relationship would exist and, under the First Circuit's test, all cases could logically go forward. However, § 3730(b)(5), unlike the public disclosure jurisdictional bar found in § 3730(e)(4), contains no exception for relators who are deemed to be an "original source" of the allegations. Therefore, the hypothetical identical suits should clearly be barred from going forward under a plain reading of the § 3730(b)(5).

The Court finds the Third Circuit's test and reasoning set forth in the LaCorte decision more persuasive. The Court agrees that,

> [A]s a matter of fairness claimants alleging the same material facts as prior relators should not share in a qui tam award, because their allegations are unlikely to increase the total recovery. In addition, such duplicative claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds.

149 F.3d at 234.

Therefore, the Court will apply the test adopted by the Third Circuit in LaCorte to determine whether Lujan is barred by § 3730(b)(5) from bringing the present qui tam action. Thus, if Lujan's claims are based on the same essential facts as Schumer's claims, § 3730(b)(5) bars Lujan's case regardless of whether the two claims incorporate somewhat different details.

2. Lujan's And Schumer's Allegations Are Based On The Same Essential Facts

Judge Ideman determined that Lujan's allegations were "substantially similar" and thus, were "based upon" those publicly disclosed in Schumer's lawsuit. *See* Minute Order Dismissing Relator Lujan's Qui Tam Counts (Mar. 19, 1996). Lujan attempted to distinguish her allegations as involving mischarging within the B-2 program while Schumer's allegations involved cost shifting among the B-2 program and other aircrafts. However, upon reviewing both sets of allegations, the district court previously found that "Lujan's allegations are simply a variation on Schumer's." The court went on to conclude that "[t]o give credence to

Lujan's microscopically fine distinctions between her allegations and those of Schumer would do injustice to the purposes underlying the False Claims Act." *Id.* at 6 (internal citation omitted). In reviewing the district court's determination, the Ninth Circuit affirmed the finding that the:

> Schumer and Lujan allegations both involve cost-sharing transactions among and within the radar systems programs on four aircraft. The two claims involve the same commonality agreements and the same radar program contracts. In sum, we agree with the district court that Lujan's allegations are substantially similar to those disclosed in the earlier Schumer action.

Lujan, 162 F.3d at 1033.

The Court concludes that Lujan's lawsuit is based upon the same essential facts and raises the same issues as Schumer's previously-filed action. Therefore, Lujan's action is barred by § 3730(b)(5).

E. Lujan's Contention That Schumer's Claims Should Not Be Considered Because They Were Not Decided On The Merits Is Incorrect

The Court need not decide whether Lujan's claim would be barred even if Schumer's claims were not decided on the merits because it is clear, given the procedural history of the Schumer action, that the only claims of Schumer's that were not decided on the merits involved pre-1986 conduct, conduct that is no longer at issue in Lujan's case after the Ninth Circuit's recent decision. Lujan's remaining claims parallel Schumer's post-1996 claims which were decided against Schumer on the merits by Judge Pfaelzer in 1992 and affirmed by the Ninth Circuit in 1995. Therefore, Lujan's argument is without merit.

III. Conclusion

Lujan is barred from bringing this qui tam action by § 3730(b0(5) of the FCA because her action is related to a previously-filed qui tam lawsuit initiated by Schumer.[2] Therefore, Lujan's action is dismissed.

IT IS SO ORDERED.

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[2] Because the Court finds that Lujan's action must be dismissed pursuant to § 3730(b)(5), the Court declines to address Hughes' novel arguments that Lujan's action is also barred by res judicata and collateral estoppel.